Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2004

DARRELL G. OBER,

Petitioner

VS.

RICK BROWN, SYNDI GUIDO, BARBARA CHRISTIE, and JOANNA REYNOLDS

On Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under the facts below were petitioner's remedies limited to Federal Rule of Civil Procedure 11 sanctions, or did petitioner suffer an actionable First Amendment injury?

2. Are criminal acts performed by lawyers and a police investigator, which are designed to deter and discourage a police officer plaintiff from pursuing his civil rights claims, within the "scope of representation" of defendants lawyers, such that the plaintiff's only recourse is to Rule 11 sanctions and no First Amendment claims can lie?

PARTIES TO THE PROCEEDINGS

The petitioner is Darryl G. Ober a Captain in the Pennsylvania State police

The Respondents are State Police Captain Rick Brown, and State Police attorneys Cindy Guido, Barbara Christie, and Joanna Reynolds

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OPINIONS BELOW

The decision of the Court of Appeals is docketed at No. 03-3754 in the United States Court of Appeals for the Third Circuit. The Court of Appeals classified the opinion as "Not Precedential" and it is reprinted in the Appendix to this petition ("Pet. App.") at 1a. The decision of the District Court is not reported, but is reprinted at Pet. App.6a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 14, 2004, and this petition is being filed within 90 days thereafter. The court has jurisdiction pursuant to 28 USC §1254(1)

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of United States reads as follows:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances"

STATEMENT OF THE CASE

During the litigation of a previous case which, incidentally, reached the final stages of consideration for review by this court *Ober v. Evanko*, No. 02-3725 WL 22596339) the respondents, Guido, Christie, and Reynolds who were performing as attorneys for the Pennsylvania State Police, defendants there, engaged in prodigious efforts to intimidate Mr. Ober and his attorney. As part of a summary judgment filing in the District Court below, the respondents appended exhibits with pictures of the wife of petitioner's attorney, along with copies of her driver's license, and a criminal history inquiry (counsels wife has no criminal history). The respondents also indicated that their investigation, the purpose of which was not explained or presented in the summary judgment motion, was unable to locate or find evidence of a lawful marriage between Mr. Ober's attorney, Mr. Bailey and Mr. Bailey's wife. References were also made to the Bailey's family and their children. One of the respondents is a Captain for the Pennsylvania State police named Brown. Initially it was believed that Brown was the person who had unlawfully used the law-enforcement computer resources to create the information used in the respondents brief below. As a matter of a few weeks ago it was only just revealed that Brown may have unlawfully procured the help of other Pennsylvania State police officers in that effort. Regardless, neither in the district court's opinion, nor in the Third Circuit Court of Appeals opinion is Brown, or his wrongdoing addressed. The petitioner did request sanctions from the trial court. They were never addressed. Brown, at the time that the case below was filed, was the director of the Pennsylvania State police Internal Affairs Division. As such he had tremendous power to affect the careers of PSP members. Brown suborned perjury and also approached a Pennsylvania State police Major, attempting to have her change the adjudication of an alleged

misconduct pretexually launched against another outstanding Pennsylvania State police officer, such that his availability and credibility as a witness for Ober, in his original case, would have been negatively affected. Luckily, the officer who was approached refused. This officer, Major Merryman, like Ober, had an exemplary, spotless record, as a Pennsylvania State police officer. He has since retired. Virtually all of these actions were decided by the District Court on the erroneous reasoning that the highly regarded federal district judge (the Honorable William J. Caldwell), who had dismissed an earlier abuse of process claim against these very respondents, was somehow equated with the issue of sanctions. Regardless, neither of the trial court judges at the District Court level, who had jurisdiction of the case (Judges Caldwell and Connor) ever reviewed or visited the issue of sanctions which had been raised there. When Judge Connor decided the respondents' motion for judgment on the pleadings, which is the underlying subject of this appeal, he ironically did so on the basis that the misconduct complained of by Ober in the form of the First Amendment violations he claimed were "within the "course of representing their clients Pet App 4a,11a." and thus could not be address as a First Amendment claims but rather as an abuse in litigation punishable only by sanctions. The holding of the 3rd Circuit is that state actors who engage in criminal misconduct are responsible for nothing more than fraudulent misconduct in representing their clients. This appeal addresses that issue i.e. what is the scope of representation in a case where attorneys for a powerful statewide Police Department commit criminal acts, in an effort to intimidate a plaintiff's lawyer and in doing so attacks his family threatening official oppression.

REASONS FOR GRANTING THE WRIT

Unfortunately the Third Circuit opinion Pet. App.1a-5a misapprehends the facts in the original Ober case (*Ober v. Evanko*, No.02-3725, 2003 WL 22596339) and even erroneously indicates that an "established PSP regulation" required Ober (who had been contacted by the FBI for information) to report an FBI investigation into PSP "higher-ups" to an immediate supervisor, who was clearly a potential target of the FBI probe into public corruption and who was not even at his duty station yet. Ober had sought the advice of a Deputy Commissioner who Ober knew could not have been in a position to participate in the corruption (the Commissioner himself, Paul Evanko was definitely a potential target) a Lieutenant Colonel named Hickes. Hickes ordered Ober not to divulge this information to anyone else and to report only to him. He was in Ober's direct chain of command. When Evanko found out later, the retribution he visited upon Captain Ober was beyond the extreme. Regardless, applying an adverse employment action standard to this First Amendment right to speak out on matters of public concern case, and misapprehending not only the facts, but the language of a PSP regulation, the Third Circuit panel, in the aforementioned case, overturned Federal District Judge William J. Caldwell and dismissed Ober's action. A writ was filed in this Court which reached the final stage of review but the appeal was not heard. Although the disposition of the above case was not relevant to the claims made by Ober in the case under appeal, the Third Circuit panel which heard this matter once more nonetheless misapprehended and erroneously referenced the facts in *Ober v. Brown* just as it had in *Ober v. Evanko*, or at least it did not address the most onerous and cogent First Amendment issue raised, namely the efforts to intimidate Ober's attorney and thus deter Ober from pursuing his rights in court. The Third Circuit agreed with the District Court

that the egregious matters in which the respondents attorneys engaged, to include violations of the criminal law and the rights of third persons (petitioner has just learned how this was done) were matters within the "scope of representation" of the respondent government lawyers and are not valid First Amendment claims violating Ober's right to be free of retaliation for petitioning his government for a redress of grievances. The Third Circuit Court of Appeals panel, in an opinion written by Circuit Judge Ambro admits that Ober's filing of the original suit "is protected under the First Amendment, *Anderson v. Davila*, 125 F.3d 148 , 161 (3d Cir. 1997)". Judge Ambro writes further that "he(Ober) obviously fails to satisfy the second prong; he does not provide us with any factual or legal support for his contention that the alleged actions the attorneys and their investigator's took were retaliation against him for his a lawsuit, as opposed to the actions merely taken for the purpose of defending a lawsuit". The Third Circuit goes on to say that Ober is "alleging nothing more than defendants' misconduct in the course of representing their clients, which, if true, should have resulted in sanctions assessed by the Ober I (*Ober v. Evanko*) Court." Petitioner respectfully disagrees. There is great danger in our courts minimizing and trivializing behavior by attorneys (state actors in this case) who, in particular, represent police departments and use the great resources and powers of those police department's, along with using officials in the PSP, like Captain Brown, all under the cover of "attorney work product" to conduct unlawful investigations that violate the criminal law and outrageously violate rights of litigants in federal court and their lawyers. This is particularly so when the unlawful conduct has absolutely nothing to do with the defense of any client but is designed to frighten, intimidate, and deter the exercise of one's right of access to the courts. The Third Circuit opinion makes virtually no mention of Brown's misconduct and it specifically does not accurately

portray the misconduct these respondents engaged in. There was virtually no connection between the obviously threatening and not so subtle messages to Ober and Ober's attorney and his family that they were under the state's watchful eye for no reason other than to frighten Darrell Ober. The Third Circuit sites *Heffernan v. Hunter*, 189 F.3d 405 (3d Cir. 1999) for the proposition that misconduct during the conduct of civil litigation should in all circumstances be limited to a remedy of sanctions. However in this case, and in cases like this, there is a great danger that a citizens right to due process, as has happened to Darryl Ober in this case will result in his being denied an opportunity to fully litigate the deprivation of his rights. In the non-precedential case of *Bristow v. Clevenger* 29 Fed. Appx. 813, 2002 U.S. App. LEXIS 4110 the Third Circuit wrote as follows: " The right of access to the courts is protected by the First Amendment, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510(1972); *Brown v. Grabowski*, 922 F.2d 1097, 1111(3d Cir. 1990). And retaliation for exercising a constitutionally protected right is, in itself, a violation of constitutional rights; the retaliation need not be physical and nature, or rise to the level of a substantive due process violation. See, e.g., *Anderson v. Davilla*, 125 F.3d 148 (3d Cir. 1997) (retaliation consisting of surveillance). In *Bradley v. Pittsburgh Board of Education,* 910 F.2d 1172(3d Cir. 1990) this court upheld a claim of retaliation in the form of a ban on plaintiff-teachers classroom activities, delay of return to work, etc. in that case, Judge Sloviter noted "an action that would otherwise be permissible is unconstitutional it is taken in retaliation for the exercise of the right of access to the courts" Id at 1177. Thus, regardless of whether the alleged harassment was sufficiently serious to trigger substantive due process concerns, it was error to dismiss the retaliation claim on the basis of the pleadings..." Thus a serious Federal question is presented. If the circumstances already

recognized by the Third Circuit Court of Appeals in *Bristow* as sufficient to empower a citizen to bring a First Amendment claims for denial of access to the courts is as limited as the holding suggests than how could such serious offenses as those described in this case be denied an opportunity for a full and complete remedy and the opportunity to litigate. Surely limiting a remedy where state actors can violate the criminal law with impunity and engage in egregious violations of the plaintiff's, his attorney's, and witnesses' rights to the extremely limited remedies that Rule 11 provides plays into the hands of state actors whose likely predilections to suffer Rule 11 sanctions at the hands of a federal judge as opposed to the major advantages of pressuring a plaintiff into dropping his case or not proceeding further, works to denigrate the proper role and function of constitutional torts in our system. There was no connection between the threats to counsel and his family that served any purpose in Ober's litigation. It was only meant to intimidate Ober. Judge Ambro's description of this misconduct as merely "inappropriately, distasteful, or unlawful (as if unlawful misconduct is not that important misses the point at why the conduct was engaged in. It was not "within the scope of representation".

CONCLUSION

Wherefore this court is respectfully requested to grant petitioner's writ. The issues raised by the Third Circuit Court of Appeals' opinion below are in contradiction of established law and the intent and holdings of this Court. Furthermore the order and memorandum under appeal pose an imminent danger to the fundamental meaning of the First Amendment, to the U.S. Constitution, and to the rights of litigants yet to come who are entitled to protection from egregious violations of their rights to access our courts.

Respectfully Submitted,

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APPENDIX EXHIBIT "A"

NOT PREDEDENTIAL

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 03-3754

DARRELL G. OBER

Appellant

VS

RICK BROWN, SYNDI GUIDO, BARBARA CHRISTIE, and JOANNA REYNOLDS

Appeal from the United States District Court for the Middle District of Pennsylvania D.C. Civil Action No. 02-CV-02186
District Judge: Honorable Christopher C. Conner

Submitted Under Third Circuit LAR 34.1(a) June 29, 2004
Before AMBR O, Becker and Greenburg, Circuit Judges
(Opinion filed: July 14, 2004)

OPINION

AMBRO, Circuit Judge

Darrell G. Ober appeals the District Court's order dismissing his action against counsel (and their investigator) who defended their clients against Ober in a prior lawsuit. Ober alleges that defendants' actions during that litigation were taken in retaliation against him for exercising his First Amendment right of free speech. Because we conclude that Ober's complaint failed to state a viable First Amendment retaliation claim, we affirm.

I.

In 1998, Ober, a police officer with the Pennsylvania State Police ("PSP"), learned that an FBI agent was investigating the allegation that one of the PSP troopers was taking bribes. Ober did not report this information to his direct superiors, even though an established PSP regulation required him to do so. Instead, he discussed the matter with a Deputy Commissioner of Staff, who was outside the chain of command.

Believing that certain officials of the PSP took various adverse employment actions against him in retaliation for exercising his First Amendment right to bypass the chain of command when discussing matters of public concern, in January 2001 Ober brought an action against them in the United States District Court for the Middle District of Pennsylvania. He later added a claim for abuse of legal process, alleging that Syndi Guido and Joanna Reynolds, counsel for defendants, misled the Court. The District Court dismissed Ober's claim against Guido and Reynolds, explaining that filing a motion to dismiss in defense of the lawsuit was not an abuse of legal process.

With respect to Ober's underlying First Amendment retaliation claim, the District

Court denied defendants' summary judgment motion.' We reversed, holding that defendants were entitled

to summary judgment because Ober did not engage in any constitutionally protected speech. *Ober v. Evanko,* No. 02-3725, 2003 WL 22596339, at *5 (3d Cir. Oct. 21, 2003) ("Ober was required by regulation to report his conversation to his supervisor; his decision to go outside of the appropriate hierarchy is not a constitutionally protected free speech right. . . We also noted that "none of [the alleged adverse employment] actions [against Ober] affected Ober's rank, pay, benefits or status." *Id.* at *2.

In November 2002, while the appeal of *Ober I* was pending, Ober brought the current action in the United States District Court for the Middle District of Pennsylvania against Guido, Reynolds, and Barbara Christie (all of whom were counsel for the *Ober I* defendants), and Rick Brown, an investigator for defendants' counsel in *Ober I.* Ober alleged that during the course of the *Ober I* litigation defendants committed numerous acts of misconduct, including presenting false testimony, unlawfully acquiring irrelevant personal information to intimidate him, attacking his key witness and manipulating the witness' responses intentionally to discredit him, creating a legally irrelevant false fact scenario, and failing to disclose the names of their witnesses. Ober asserted that these actions were taken to retaliate against him for exercising his First Amendment right to

That motion was based on qualified immunity rounds.
[2]Thus we did not need to decide, and did not decide, whether defendants were entitled to qualified immunity. 3

file *Ober I.* Defendants moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). The District Court granted the motion, concluding that Ober failed to state a cause of action for the First Amendment retaliation claim. He appeals.'

II.

When a Rule 12(c) motion alleges plaintiffs failure to

state a claim upon which relief can be granted as here, we analyze the motion under the same standard as a Rule 1 2(b)(6) motion to dismiss. *Turbe v. Government of Virgin Islands,* 938 F.2d 427, 428 (3d Cir. 1991). Therefore, our review of the District Court's order to dismiss is plenary and we affirm only if no relief could be granted after accepting all factual allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff. *Id.*

III.

To prevail on his First Amendment retaliation claim, Ober must establish that: (a) he engaged in activity protected by the First Amendment; (b) defendants retaliated in response; and (c) defendants could not rebut the claim by demonstrating that they would have taken the same action even in the absence of the protected speech. *Baldassare v. State of New Jersey, 250* F.3d 188, 194-95 (3d Cir. 2001). Although Ober's filing of a suit is protected under the First Amendment, *Anderson v. Davila,* 125 F.3d 148, 161 (3d Cir. 1997), he obviously fails to satisfy the second prong; he does not provide us with any factual or legal support for his contention that the alleged actions the attorneys and 'We have jurisdiction under 28 U.S.C. § 1291 their investigator took were retaliation against him for his filing a lawsuit, as opposed to the actions merely taken for the purpose of defending a lawsuit. All he asserts is how inappropriate, distasteful, or unlawful defendants' conduct was during the litigation. Thus we agree with the District Court that what Ober is essentially alleging is nothing more than defendants' misconduct in the course of representing their clients, which, if true, should have resulted in sanctions assessed by the *Ober I Court. See Heffernan v. Hunter,* 189 F.3d 405, 413 (3d Cir. 1999).

Ober also contends that defendants acted beyond the scope of their representation when they committed the alleged misconduct. As whether defendants acted within the scope of their representation has no bearing on the question

of whether their conduct was retaliatory, we do not address this issue.

Accordingly, we affirm the District Court's order dismissing Ober's complaint.

APPENDIX EXHIBIT "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DARRELL G. OBER	)	NO. 1:02-CV-2186
	)	
Plaintiff	)	
	)	(Judge Conner)
vs.	)	
	)	
RICK BROWN, SYNDI GUIDO, BARBARA CHRISTIE, and JOANNA REYNOLDS,	)	
	)	
	)	
Defendants	)	

MEMORANDUM

Presently before the court is defendants' motion for judgment on the pleadings. (Doc. 25). This is a civil rights action under 42 U.S.C. § 1983. Plaintiff, Darrell G. Ober ("Ober"), is an employee of the Pennsylvania State Police ("PSP"). He currently holds the rank of Captain. Defendants are attorneys Syndi Guido ("Guido"), Barbara Christie ("Christie"), and Joanna Reynolds ("Reynolds"), and PSP investigator Rick Brown ("Brown"). Plaintiff contends that defendants unlawfully retaliated against him for exercising his constitutional right to petition the court for redress of a grievance. (Doc. 1, ¶11 6-7).

I. Ober I

On January 16, 2001, Ober filed a civil action against certain members of the PSP, whom he alleged, inter alia,

unlawfully retaliated against him for exercising his First Amendment right to freedom of speech. See *Ober v. Evanko*, civil action no. 1:CV-O1-0084 (M.D.Pa.) ("Ober I"). Specifically, Ober alleged that the PSP and its officials retaliated against him for failing to disclose promptly a federal
investigation into a job-selling scheme perpetrated by a PSP trooper. In addition to First Amendment retaliation, the Ober I complaint sets forth the following causes of action: (1) Fourteenth Amendment substantive due process; (2) denial of Fourteenth Amendment privileges and immunities; (3) First Amendment free speech; (4) Fourth Amendment freedom from unlawful seizure; (5) denial of equal protection of law; (6) federal right to be free from unlawful civil conspiracies; and (7) state right to be free from unlawful conspiracies. Ober I (Doc 1.)

On May 2, 2001, Ober filed an amended complaint naming Guido and Reynolds as defendants and charging them with abuse of process. In the amended complaint, Ober contended that Guido and Reynolds intentionally misrepresented PSP administrative regulation 1-1.02 to the court in its brief in support of its motion to dismiss. See e.g. Ober I (Doe. 15, 15(a)). By orders dated August 13, 2001 (Doc. 32) and September 17, 2001 (Doc. 40), the court dismissed all causes action against Guido and Reynolds and removed them as parties to Ober I. Thereafter, Judge Caldwell denied Ober's motion for summary judgment, and granted defendants' motion for summary judgment except for plaintiff's First Amendment retaliation and state law conspiracy claims. See Ober I, (Doc. 104, ¶91 2-3). The Ober I defendants appealed the court's summary judgment ruling to the Third Circuit; they contend that they are entitled to qualified immunity for

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1 By order dated August 27, 2002, Judge Caldwell transferred this case to the undersigned for trial. Ober I

(Doc. 104, ¶ 8).

Ober's remaining claims. Plaintiff did not appeal the court's summary judgment ruling.

II. Ober II

Ober filed the instant matter against Guido, Christie, Reynolds, and Brown on November 29,2001 (Ober II). Attorneys Guide, Christie, and Reynolds represented the defendants in Ober I. Brown assisted Guido, Christie, and Reynolds in investigating Ober's allegations in Ober I. In Ober II, plaintiff reasserts his contention that defendants filed fallacious briefs in an attempt to mislead the court. He also raises new claims that defendants suborned perjury on several occasions and plotted unlawful schemes to discredit at least two of plaintiff's key witnesses in Ober I. (See Ober II, Doc I). In the instant complaint, plaintiff styles these causes of action as retaliation for exercising his First Amendment right to access to courts. Id.. In addition to filing Ober II, plaintiff presented many of the instant claims in his Ober I appellate brief filed in the Third Circuit. (See Doc. 26, Exhibit H).

Defendants present the instant motion to dismiss under Federal Rule of Civil Procedure 12(c) on June 25, 2003. (Doc. 25). Defendants assert that the complaint fails to state a claim upon which relief can be granted because each of

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[2] Plaintiff also alleges an unlawful conspiracy to violate Adrienne Palarino Bailey's ("Palarino-Bailey") privacy, and to create "a ruse about Ober's use of P.R. Video, a court reporting firm," which Palarino-Bailey owns and operates.

the claims *was* either raised, or could have been raised, in

Ober I. Defendants contend that the court should dismiss this action and require plaintiff to pursue these claims within the context of Ober I.

III. Legal Standard

A motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is analyzed under the same standard as a motion to dismiss under Rule 12(b)(6). See Turbe v. Government of Virgin Islands, 938 F. 2d 427, 428 (3d Cir. 1991) (holding that when a 12(c) motion claims plaintiff failed to state a claim upon which relief can be granted, the court shall apply the same standard as in a 12(b)(6) motion); *Bald Eagle Ridge Protection Ass'n. Inc. v. Mallory,* 119 F.Supp.2d 473, 476 (M.D.Pa. 2000) (citations omitted).

The court must accept as true all factual allegations set forth in the complaint as well as all reasonable inferences that can be drawn therefrom. Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996); *Bald Eagle Ridge*, 119 F.Supp.2d at 476-77. The court looks only to the facts alleged in the complaint and any attachments, without reference to any other parts of the record. *Jordan v. Fox. Rothschild O'Brien &Frankel,* 20 F.3d 1250, 1261 (3d Cir. 1994). "[A] case should not be dismissed unless it clearly appears that no relief can be granted under any set of facts that could be proved consistently with the plaintiffs allegations," Id. In deciding such a motion, the court does not weigh the evidence for the truth of the matter, but simply determines whether the allegations, if proved, are sufficient to state a claim upon which relief could be granted. Bald Eagle Ridge, 119 F. Supp.2d at 477.

IV. Discussion

As aptly stated by the U.S. Court of Appeals for the Third Circuit:

> Counsels' conduct within the scope of representation is regulated by the courts. Abuses in litigation are punishable by sanctions administered by the courts in which the litigation occurs.

Heffernan v. Hunter, 189 F.3d 405,413 (3d Cir. 1999) (citing 28 U.S.C. § 1927; FED. R. Civ. P. 11(c)).

Although additional remedies may be available to redress trial counsel's allegedly fraudulent conduct,[3] a retaliation claim is not among those remedies. A retaliation claim consists of three elements:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two--that is, the adverse action was motivated at least in part by the plaintiffs protected conduct.

See Heffernan, 189 F.3d at 405 (3d Cir 1999) (suggesting that plaintiff may be entitled to bring a claim for wrongful use of civil proceedings against attorney under 42 Pa.C.S.A. § 8351). See also General Refractories Co. v. *Fireman's Fund Insurance* Co, 337 F.3d 297, 304 (3d Cir. 2003) (abusive litigation conduct directed at securing victory in a lawsuit is sufficient to state an abuse of process tort claim). We reiterate that the court in Ober I has already dismissed plaintiff's claims against Guido and Reynolds for abuse of *process* for filing a false brief, Ober I (Does. 32 & 40); thus, the doctrine of collateral estoppel may preclude an abuse of process claim, at least with respect to these claims. Furthermore, abuse of process is a matter of state tort law. This court clearly lacks subject matter jurisdiction to entertain a Pennsylvania abuse of process tort claim when there is no diversity of citizenship.

Thaddeus-X v. Blatter, 175 F.3d 378, 394(6th Cir. 1999). See also *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003)

(prisoner access to courts case).

Plaintiff's act of filing suit in Ober I is a protected activity. "The Supreme Court has consistently held that an individual's constitutional right of access to court is protected by the First Amendment's clause granting the right to petition the government for grievances." *Anderson v. Davila*, 125 F.3d 148, 161 (3d Cir. 1997). However, allegations that a defendant or defense counsel conducted a fraudulent or perjurious defense is insufficient to state a claim for retaliation. See *Gittens v. Sullivan*, 670 F.Supp. 119, 125 (S.D.N.Y. 1987). See also *Taco Bell Corp v. Cracken*, 939 F.Supp. 528 (N.D. Tex. 1996) ("Even meritless conduct is not actionable when it comes in the discharge of [the attorney's] duties in representing a party in a lawsuit.' ") (quoting *Bradt v. West*, 892 S.W.2d 56, 74 (Tex.App. 1994)).

Taking the facts in the complaint as true, the complaint fails to state a claim for retaliation, hence, the court will grant defendants' Rule 12(c) motion to dismiss.

An appropriate order will issue.

S/Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: September 3, 2003

(2)

No. 04-521

Supreme Court, U.S.
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DARRELL G. OBER,

Petitioner,

v.

RICK BROWN, SYNDI GUIDO,
BARBARA CHRISTIE, and JOANNA REYNOLDS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether lawyers' actions in representing their clients support a subsequent lawsuit against those lawyers for alleged First Amendment retaliation.

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SUPREME COURT RULE

Rule 10 2

STATEMENT OF THE CASE

This Petition concerns two separate First Amendment retaliation lawsuits filed by Darrell G. Ober ("Ober") against the Pennsylvania State Police ("PSP") and several PSP employees. In his first lawsuit, Ober alleged that the PSP and certain officials retaliated against him for failing to disclose promptly, through his chain of command, a federal investigation into a job selling scheme perpetrated by a PSP Trooper (*Ober I*). The United States Court of Appeals for the Third Circuit concluded that Ober did not engage in protected speech, reversed the District Court's denial of Defendants' Motion to Dismiss and Ordered Ober's Complaint dismissed. *See Ober v. Evanko*, No. 02-3725, 2003 WL 22596339 (3d Cir. Oct. 21, 2003). This Court denied Ober's Petition for Writ of Certiorari. *See Ober v. Evanko*, 124 S. Ct. 2029 (2004).

In his second lawsuit (*Ober II*), which is the subject of this Petition, Ober sued the PSP attorneys and their investigator from *Ober I*, alleging retaliation. This "retaliation" included purportedly filing false or misleading pleadings, suborning perjury and preparing false or misleading affidavits during the *Ober I* litigation. Each act of alleged retaliation by the attorneys in *Ober II* is alleged to have occurred during or would have been known by Ober in the first case. Yet, Ober failed in *Ober I* to seek sanctions against the attorneys for this alleged misconduct.

SUMMARY OF ARGUMENT

Petitioner fails to offer the required compelling reason to justify review of his petition for a writ of certiorari. He

cites no conflict among state or federal courts and does not identify the type of important question that should be settled by this Court. Instead, the Petitioner asks for this Court's intervention based exclusively on a purported error of fact or a misapplication of the properly stated law. These grounds rarely support a petition for writ of certiorari. Sup. Ct. R. 10.

Further, the courts below made no erroneous factual findings or misapplication of law. Indeed, lawyers' actions in the course of defending their clients in a lawsuit cannot form the basis for a subsequent First Amendment retaliation lawsuit. The remedy for such alleged misconduct, if any, is court-imposed sanctions. Where such sanctions are neither requested by Petitioner nor imposed by the Court, the Petitioner cannot create a second opportunity to allege misconduct by filing a subsequent First Amendment lawsuit claiming retaliation.

REASONS FOR DENYING REVIEW

I. OBER FAILED TO SATISFY HIS STRINGENT BURDEN TO JUSTIFY THIS COURT'S GRANTING OF HIS PETITION

Petitioner relies on the lower courts' alleged "misunderstanding of the facts" and "failure to accurately portray the misconduct of Respondents" to establish compelling reasons for this Court to grant his petition for writ of certiorari. *See* Petition at 4,5,6. These grounds rarely support the granting of a petition for writ of certiorari. Sup. Ct. R. 10. This case is not one of those rare circumstances. Here, Petitioner merely disagrees with the lower

courts' findings without offering any legal basis to support this Court's review of those findings.

Further, the Petitioner concedes that no conflict exists among or between the district courts, courts of appeal and state courts of last resort regarding whether his First Amendment retaliation claim is actionable.[1] Accordingly, Petitioner fails to offer any compelling reason to justify this Court's intervention.

II. THE THIRD CIRCUIT CORRECTLY APPLIED THE LAW THAT LAWYERS' ACTIONS IN REPRESENTING THEIR CLIENTS DO NOT SUPPORT A SUBSEQUENT FIRST AMENDMENT RETALIATION LAWSUIT AGAINST THOSE LAWYERS

Even accepting as true Petitioner's allegations of misconduct, the law does not recognize a First Amendment retaliation claim. *See Heffernan v. Hunter*, 189 F.3d 405, 412 (3d Cir. 1999) (holding that even though an attorney's challenged activity, taken within the scope of representation, may violate the canons of ethics, does not mean that the conduct is actionable in damages or for injunctive relief – the offended party has a remedy through court-imposed sanctions or reference to state disciplinary bodies);

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[1] Indeed, the authorities cited by Petitioner do not even address that issue. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (antitrust violation alleged); *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990) (woman's due process right of access to courts for state's failure to advise her of right to restraining order); *Anderson v. Davila*, 125 F.3d 148 (3d Cir. 1997) (need to vacate permanent injunction due to lack of notice); *Bradley v. Pittsburgh Board of Education*, 910 F.2d 1172 (3d Cir. 1990) (regulation of teacher's in-class conduct does not violate the First Amendment).

Maritrans GP v. Pepper, Hamilton and Scheetz, 529 Pa. 241 (1992) (same); *Farese v. Scherer*, 342 F.2d 1223, 1232 (11th Cir. 2003) (attorney's conduct within scope of representing client will not subject him to liability); *Taco Bell Corp. v. Cracken*, 939 F. Supp. 528, 533 (N.D. Tex. 1996) (no action exists against an attorney whose conduct was part of the discharge of his duties in representing his client); *Gittens v. Sullivan*, 670 F. Supp. 119, 125 (S.D.N.Y. 1987) (same); *White v. Bayless*, 32 S.W. 3d 271, 276 (Tex. App. 2000) (even when attorney engages in wrongful conduct as part of the discharge of his duties there is no cause of action to the party on the other side).

Because all of the alleged misconduct in *Ober II* was known by Ober or occurred during *Ober I*, Petitioner's only remedy was to seek court-imposed sanctions as part of the first case. Specifically, Petitioner should have sought relief under either Fed. R. Civ. P. 11, 26, 37, 56(f) or 28 U.S.C. § 1927. Alternatively, Petitioner could have petitioned the district court to exercise its inherent power to sanction an attorney's alleged bad-faith conduct. *See Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991) (when there is bad faith conduct in the course of litigation, courts have inherent power to sanction attorneys for conduct not otherwise covered by Fed. R. Civ. P. 11 or 28 U.S.C. § 1927); *Gillette v. Bayernwald-Fruchteverwertung*, 977 F.2d 809, 813 (3d Cir. 1992) (holding that court can exercise inherent power to sanction when other rules are insufficient).[2] Under no circumstances, however, does the law recognize a First

[2] Petitioner was aware of this remedy as he allegedly requested sanctions from the *Ober I* trial court. *See* Petition at 2. Nevertheless, the district court's refusal to award sanctions does not justify a subsequent First Amendment retaliation lawsuit.

Amendment retaliation claim for alleged misconduct by attorneys.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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